In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1246

SRECKO KNEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a native and citizen of Yugoslavia who was ordered deported following his conviction for a narcotics offense, contends that the Immigration and Nationality Act, under which the deportation order was issued, deprives him of equal protection of the law and inflicts cruel and unusual punishment.

Petitioner entered the United States as an immigrant on December 30, 1960. On April 26, 1973, in the Superior Court of California at Los Angeles, he was convicted on his plea of guilty to possessing a kilo of marihuana for purposes of sale, in violation of Section 11530.5 of the California Health and Safety Code (West 1954).

At a deportation hearing on December 4, 1973, the immigration judge found petitioner deportable under Section 241(a)(11) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1251(a)(11), for having been convicted of a narcotics violation. In a writtten order on August 5, 1974, the Board of Immigration Appeals dismissed petitioner's appeal (Pet. App. D). The court of appeals affirmed (Pet. App. A). A stay of mandate was issued pending this Court's disposition of the case (Pet. App. B).

1. Petitioner contends that 8 U.S.C. 1251(a) deprives him of equal protection of the law because it fails to distinguish "between aliens who have recently departed from their native homelands and those who have become firmly resettled" in the United States (Pet. 6) and "imposes upon [resident aliens] greater penalties than are imposed upon citizens for the same * * * offenses" (Pet. 8).

Congress has specifically provided that the provisions for deportation "shall be applicable to all aliens belonging to any of the classes enumerated in [8 U.S.C. 1251(a)]" regardless of their date of entry into the United States (8 U.S.C. 1251(d)). This Court has stated that policies concerning the entry of aliens and their right to remain in this country "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" (*Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589). "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state" (*id.* at 587-588).

With respect to the congressional authority over deportation policy, aliens and citizens, quite obviously, are not similarly situated, and Congress may provide for the deprtation of aliens for conduct that would subject a citizen only to criminal liability or to no liability. See *Santelises* v. *Immigration and Naturalization Service*, 491 F.2d 1254, 1256 (C.A. 2), certiorari denied, 417 U.S. 968. Nor does the due process clause of the Fifth Amendment require Congress, in the exercise of its plenary power over deportation, to distinguish between aliens according to the length of time they have been in this country.

2. Petitioner's contention that his deportation constitutes cruel and unusual punishment was not made below and need not be considered here. In any event, "[i]t is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment" (*Mahler* v. *Eby*, 264 U.S. 32, 39). The proscriptions of the Eighth Amendment are thus inapplicable. See *Santelises* v. *Immigration and Naturalization Service*, *supra*, 491 F.2d at 1255-1256, and the cases there cited.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.